



April 11, 2000

The Honorable John McCain
Chairman, Committee on Commerce, Science
and Transportation
United States Senate
Washington, DC 20510-6125

Dear Mr. Chairman:

This letter provides you with the Department of Commerce's views on S. 1482, entitled the "National Marine Sanctuaries Amendments Act of 1999." In general, the Department supports passage of S. 1482.

The reauthorization of the National Marine Sanctuaries Act (NMSA) is of great importance to the Department and provides a unique opportunity to improve how we protect and manage our important marine resources into the next century. There are a number of similarities between S. 1482 and the Administration's proposal for reauthorizing the NMSA. While we support the bill, there are two main areas where the bill can be improved: the consultation provisions and the natural resource damage assessment provisions. We believe that improvements are needed in the consultation provisions that will make them more equitable and efficient. The Administration's proposed changes to the damage assessment provisions are important to clarify and strengthen the procedures for recovering damages for injury to sanctuary resources, and to emphasize the priority for restoring and protecting injured or degraded sanctuary resources. Details on these two areas, and a few additional recommendations are enclosed. The Administration looks forward to working with you to ensure that this important program continues to protect our valuable ocean and coastal resources.

The Office of Management and Budget has advised the Department that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

Andrew J. Pincus

Enclosure

cc: The Honorable Ernest F. Hollings
The Honorable Olympia J. Snowe
The Honorable John F. Kerry

Views on S. 1482

Sec. 4. Changes in Definitions

The National Oceanic and Atmospheric Administration (NOAA) strongly recommends revising section 4 of S. 1482 to reflect the revised definition of "damages" contained in section 302(11) in the Administration bill. This change reflects the current practice in natural resource damage assessment cases, which emphasizes a streamlined restoration-based approach to assessment of damages to sanctuary resources. This change also requires the addition of definitions for "service" and "baseline" (302(9), and 302(12) of the Administration bill, respectively) as these terms are used in the revised "damages" definition.

NOAA also recommends that the definition of "administrative record" be added to section 302 to be consistent with 42 U.S.C. 9613 (k):

The 'Administrative Record' for sanctuary restoration plans should include the following (1) Notice to potentially affected persons and the public, accompanied by a brief analysis of the plan and alternative plans that were considered, (2) Reasonable opportunity to comment and provide information regarding the plans, (3) Response to each of the significant comments and additional data submitted, and (4) Opportunity for public meeting where the size of the restoration plan warrants such meeting.

Sec. 6. Changes in Procedures for Designation and Implementation

NOAA recommends section 6 of S. 1482 be revised to amend section 304(d) (Interagency Cooperation) to add a provision of programmatic consultation and require other Federal agencies to take action to respond to damage caused by that agency, as proposed in the Administration bill.

Programmatic consultation would allow NOAA, as appropriate, to enter into one consultation for a class of activities conducted by one agency or at one site, as opposed to having to consult separately on each individual action proposed by an agency. This would significantly decrease the administrative burden for both NOAA and other Federal agencies consulting with NOAA, as well as making the consultation much more efficient.

The Administration bill's requirement that other Federal agencies respond to, and mitigate or restore damages resulting from, injury to Sanctuary resources caused by actions that have been taken contrary to the Secretary of Commerce's recommendations, treats the Federal Government similarly to the public. NOAA believes that Federal agencies should be similarly accountable as the private sector when action results in injury to sanctuary resources in such circumstances.

Sec. 13. Changes in Provisions Concerning Destruction, Loss or Injury

NOAA suggests S. 1482 be revised to amend section 312 (Destruction of Loss of, or Injury to, Sanctuary Resources) as proposed in the Administration bill. The following changes to section 312 are important to clarify and strengthen the procedures for recovering damages for injury to sanctuary resources, and to emphasize the priority for restoring and protecting injured or degraded sanctuary resources.

Section 312(a)(1) should be revised by clarifying that a person is liable if he or she "creates an imminent risk of destruction, loss of or injury to any sanctuary resource." This change is important as NOAA can incur costs responding to incidents that create imminent risk of injury to sanctuary resources in ensuring that actual injury is avoided or minimized. Such costs should be recoverable from a responsible party and the clarification would eliminate the possibility of a responsible party arguing it is not liable for such costs.

Section 312(a)(1) should also be revised by adding joint and several liability. Failure to specify joint and several liability has already lead to costly litigation. Clarifying joint and several liability in this section will ensure that time and resources are spent by the trustee on restoration and not in parceling liability between responsible parties.

Revise section 312(a)(1)(A) to clarify that recoverable damages include damages from response actions. This change makes clear that NOAA can recover costs if damage is exacerbated by response actions, such as additional coral reef damage from removing a grounded vessel.

Revise section 312(a)(1)(B) by adding "costs related to seizure, forfeiture, storage, or disposal" to explicitly clarify that NOAA can recover these costs that are often incurred in damage assessment cases.

Revise the defenses in section 312(a)(3) to clarify that a responsible party may not abrogate its responsibility for liability by claiming the injury was caused by its contractor or agent (312(a)(3)(A)). Further, section 312(a)(3)(B) should be revised to clarify that an activity causing injury must be specifically authorized under a Federal or state law or permit for it to fall within the defense. The responsible party remains liable for any further damage occurred when following instructions by response authorities.

Revise section 312(c) by renumbering the present 312(c) to 312(c)(1) and adding a new 312(c)(2) to include standard of review section with a definition of standard of review as follows:

"In any civil litigation brought by the United States on behalf of the Secretary, a reviewing court shall determine the liability of the defendant(s) based upon the preponderance of the evidence. Further, a reviewing court shall uphold the Secretary's decision in selecting a restoration plan unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law. Should the court reject the plan proposed by the Secretary on that basis, the court shall award only those costs of assessment, response costs, the value of the sanctuary resource if

the resource cannot be restored or replaced or if the equivalent of such resource cannot be acquired, and monitoring costs associated with the injury, damage, or destruction.”

Revise section 312(d), Use of Recovered Amounts, to clarify how recovered funds are to be used.

- Revise section 312(d)(1) to clarify that monies recovered for past response and other costs are to be used to reimburse the Secretary and other response agencies, as appropriate. Monies recovered as damages are to be used for restoration, prevention and other priorities in descending order (312(d)(2)). This process is more in line with actual practice than is the existing statutory language in 312(d).
- The new 312(d)(2)(B) in the Administration bill expressly allows the use of recovered funds for activities to prevent similar damages in the future. A highly successful example of this kind of use with recovered funds is the installation of the Raycon beacons in the Florida Keys National Marine Sanctuary. While this may be done under the current law, it is important enough to expressly clarify this purpose in section 312(d)(2).
- S. 1482 proposes a two-year statute of limitations in a new section 312(d)(4). We urge you to revise this to be three years, consistent with similar Natural Resource Damage Assessment provisions in CERCLA, the Oil Pollution Act, the Clean Water Act, as well as the Administration bill.

In addition, we suggest adding Section 312 (e), providing for an administrative record, in accordance with CERCLA (42 U.S.C. 9813(k)) :

(i)Administrative Record - The Federal Trustee or trustees of sanctuary resources injured, destroyed, or lost as a result of an action or inaction by any person may establish an administrative record on which it or they will base the selection of a plan for restoration of those resources. The plan shall include a determination of the nature and extent of such sanctuary resource injury, destruction, or loss. The administrative record shall be made available to the public at or near the sanctuary at issue.

(ii) Judicial Review - Judicial review of any restoration plan selected by a Federal trustee in accordance with the procedures required by this paragraph shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the Court. In considering objections to such a restoration plan, the Court shall uphold the Federal trustee's decision in selecting the plan unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law.

Sec. 17. Changes in the Support Enhancement Provisions

NOAA strongly recommends revising section 16 of S. 1482 as it pertains to cooperative agreements (see section 17(2) of S. 1482 which amends section 316(a)(4)). As proposed, NOAA

would be authorized to enter into "cooperative agreements" only with a non-profit organization with which NOAA has an agreement under section (f) of section 316. However, this provision is problematic for two reasons:

- First, a "cooperative agreement" is a defined term meaning a form of financial assistance similar to a grant, under which the Federal Government transfers money to another entity. Section (f) does not contemplate use of "cooperative agreements." Rather, NOAA collaborates with a variety of outside entities on activities that further the purposes of the NMSA. In such instances, NOAA would like the ability to allow its partner(s) to use the sanctuary symbol. One example is the partnership with the National Geographic Society's Sustainable Seas Expeditions. Under the current law, only official sponsors, which is a term that is narrowly defined, may use the sanctuary symbol.
- The second concern with section 17(2) of S. 1482 is it would limit the use of the logo to (other than official sponsors) only a non-profit organization described in section (f). Again, NOAA partners with a variety of outside entities in furthering the NMSA and would like more flexibility in authorizing use of the sanctuary symbol. Consequently, NOAA strongly suggests section 17 of S. 1482 be revised similar to section 316 of the Administration bill, which authorizes use of the sanctuary symbol by any person with whom NOAA is engaged in a collaborative effort to further the NMSA.